S. W. 876, 881; *State* v. *Kysilka*, 85 N. J. L. 712, 90 Atl. 309. Any hearsay danger, moreover, can be obviated by instructions. See *Wright* v. *Beckett*, 1 M. & Rob. 414, 419; 2 WIGMORE, EVIDENCE, § 1018. In a great many American jurisdictions statutes make these contradictory statements admissible under all circumstances. See 2 MASS. REV. L. 1902, c. 175, § 24; CAL. CODE CIVIL PROCEDURE, 1909, § 2049; 1 IND. REV. STAT., 1914, § 531. Compare 17 & 18 VICT., c. 125, § 22 (1854). It is questionable, however, whether it is wise to dispense with the trial judge's discretion, or to admit the prior statements under any circumstances, where the party never hoped to elicit the truth but was seeking some dramatic effect.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER BY PATIENT'S TESTIMONY CONCERNING PHYSICAL CONDITION. — A statute forbade the examination of a physician as to any "communication made by his patient" or "any knowledge obtained by personal examination of such patient," unless the patient consent or voluntarily testify "with reference to such communications." Though the plaintiff had testified as to his injuries, his objection to the examination of his physician was sustained by the trial court. *Held*, that the ruling is correct. *Arizona & New Mexico Ry. Co.* v. *Clark*, 235 U. S. 669.

For the patient to offer evidence as to the communication made to a physician is a waiver of the privilege as regards that physician. *Rauh* v. *Deutscher Verein*, 29 N. Y. App. Div. 483, 51 N. Y. Supp. 985; *Pittsburg C. C. & St. L. R. Co.* v. *O'Conner*, 171 Ind. 686, 85 N. E. 969. But the offer of the testimony of one physician is not a waiver of privilege as to the testimony of other physicians not present in consultation with him. *Penn Mutual Life Ins. Co.* v. *Wiler*, 100 Ind. 92; *Barker* v. *Cunard S. S. Co., Ltd.*, 91 Hun (N. Y.) 495, 36 N. Y. Supp. 256. *Contra*, *State* v. *Long*, 257 Mo. 199, 165 S. W. 748. See 28 HARV. L. REV. 116. Thus it appears that it is not the purpose of these statutes to keep secret the ailments of the patient, but to protect the communications which he makes to his physician. The knowledge gained by the physician through a physical examination of the patient, as well as what he is told by the patient, constitutes a communication within the meaning of the statutes. *Prader* v. *National Masonic Accident Ass'n*, 95 Ia. 149, 63 N. W. 601; *Rose* v. *Supreme Court*, 126 Mich. 577, 85 N. W. 1073. But for the patient to testify as to his symptoms, as in the principal case, without mentioning anything spoken or disclosed to the physician, since it is not giving in evidence any communication made by word or act, is properly held not a waiver of the privilege. *Green* v. *Nebagamain*, 113 Wis. 508, 89 N. W. 520; *May* v. *Northern Pacific Ry.*, 32 Mont. 522, 81 Pac. 328; *Williams* v. *Johnson*, 112 Ind. 273, 13 N. E. 872. *Contra*, *Forrest* v. *Portland Ry. L. & P. Co.*, 64 Ore. 240, 129 Pac. 1048. But see 4 WIGMORE, EVIDENCE, § 2389. This conclusion receives support from analogous decisions with reference to privileged communications between attorney and client. *State* v. *White*, 19 Kan. 445; *Bigler* v. *Reyher*, 43 Ind. 112. *Contra*, *Woburn* v. *Henshaw*, 101 Mass. 193. See 4 WIGMORE, EVIDENCE, § 2327.

---

# BOOK REVIEWS

INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. By A. V. Dicey. Eighth Edition. London: Macmillan and Company, Ltd. 1915. pp. cv, 577, 2.

Students of law and government have long since learned to welcome each new edition of this deservedly famous work, but the eighth edition will be especially appreciated for its introduction. Since Professor Dicey first published this book in 1884 great and far-reaching changes have occurred in the structure of the

British government. Each new edition has been brought down to date by annotations and changes in the text, but, as the author himself observes, "Recurring alterations destroy the original tone and spirit of any treatise which has the least claim to belong to the literature of England." He has, therefore, in the present edition in substance reprinted the seventh edition with an introduction which aims to summarize and analyze the changes which thirty years have wrought in the English Constitution. Such a departure is not one to be indiscriminately recommended (at least, in cases in which the original author is not the editor), but in this instance it is more than justified by the results. Nowhere will one encounter a more pleasing combination of cold, clean-cut analysis and red-blooded English patriotism than in this brief comparison of the English Constitution in 1884 and in 1914. The pages are filled with that warm glow which emanates from a strong belief in the future of the British Empire, not unmixed with a fervent desire to make things better where they seem at fault. Yet optimism and a just pride do not in the least impair the author's ability to state the problems which confront the nation with the deliberate dispassionateness of a scientist.

Thus, he is not entirely satisfied with the results of the Parliament Act of 1911, which, it will be remembered, destroyed the veto of the House of Lords on money bills, and left that House with only a suspensive veto on other public bills. This suspensive veto, he complains, is vexatious rather than effective. The requirement that the bill must pass the House of Commons in three successive sessions in substantially the same form in order to override the veto of the Lords blocks all amendment after the first passage, and results in the anomalous spectacle of an attempt to pass as an independent measure an amendment to a bill which has not yet become law. Moreover, the tendency of the changes brought about by that act is to increase the power of the party which for the time being has a parliamentary majority, and to concentrate that power in the hands of the cabinet as the guiding committee of that party. English government threatens to become more and more partisan government. The free lance in the House of Commons is becoming extinct. Party mechanism has become so rigid that the cabinet, supported by its solid majority in the House, has become absolute. The electorate is still nominally supreme, but its control threatens to become limited to the power of transferring the reins from one party to the other every five years. Parliament tends to become more and more a mere electoral college for registering the periodical mandate of the nation, and less and less the historical battle-ground of political opinion.

Professor Dicey, in fact, views with alarm the increasing dominance of the party machine in English government. Thus, he favors the referendum, or, as he calls it, "the people's veto," not as a touchstone of good government, but as a corrective of the more patent evils of party government, especially as a check upon the absolutism of the majority in Parliament, and as a means for the expression of opinion by the electorate without the embarrassment occasioned by the confusion of issues attendant upon a general election.

He also fears the effect of the Parliament Act upon the hitherto non-partisan and judicial character of the Speaker of the House of Commons, who is given the sole power to certify that a bill passed under the act complies with its provisions, a power which may induce the majority to desire a Speaker of its own political complexion.

The American reader will note with sympathetic interest Professor Dicey's uneasiness over the decline in reverence for the law in England. But observe how fairly he analyzes the problem. The domain of law has been threatened from two quarters. The increasing paternalism of government has led to the placing of judicial or quasi-judicial functions in the hands of administrative officers in many matters. This is a necessary accompaniment to the broadening scope of governmental activity. The judiciary is not adapted to handle

cases in which it is much more important to act promptly and firmly than to protect private rights and privileges. But there are limits even to such a delimitation of judicial powers, and Professor Dicey registers a firm protest against the apparently absolute immunity from court control of the Speaker of the House of Commons in certifying bills under the Parliament Act.

On the other hand, he remarks an increasing distrust of the courts and disrespect for the laws, whenever they seem to oppose the best interests of any social or political faction. Here he touches upon something which should be close to the quick of American public thought. He finds a reason for organized labor's distrust of the courts in the fact that the law has not proved itself adapted to compensate for economic inequalities, and hence seems to lend itself to perpetuating them. Thus, the trade unionist's natural enemy, "the blackleg," is nearly always within the law, while the labor unions have had to resort to the fiction of "peaceful picketing" and to legislation practically granting them immunity from the consequences of illegal action in order to battle on a strategic equality. This explanation of a perplexing problem seems even more applicable to American conditions, where legislative attempts to level up these economic disadvantages are constantly made abortive by the strict enforcement of constitutional limitations by the courts. Who can blame the workingman for distrusting courts which seem bent on emphasizing rather than alleviating his economic disadvantages?

The militant suffragette, of course, presents another phase of disrespect for law. Increasing democracy in government has a tendency to subvert the stability of the law. Public opinion becomes the Aladdin's lamp of progress, and all must bend before it. But, as has been well pointed out by President Lowell elsewhere, much that passes for public opinion to-day is neither public nor opinion. The result is that when any considerable body of agitators finds its policies opposed by the slow moving wheels of the law it cries, "Tyranny!" and forthwith demands progress without law. It is all much like the story of the mischievous shepherd and the wolves, — there have been so many false alarms that supporters of law and order are sometimes in doubt what is true public opinion and what is simply organized noise.

In his discussion of the new constitutional ideas which the past thirty years have brought forth Professor Dicey considers woman suffrage, proportional representation, federalism, and the referendum. His attitude toward the last has already been mentioned. In his discussion of woman suffrage he appears for the once carefully non-committal and vague, but intimates a hostility toward the full political equality of the sexes. He is, however, distinctly and more convincingly opposed to proportional representation, because it will complicate the electoral machinery and emphasize party domination, because it will lead to government by factions with all the untoward results which attend the disintegration of parties upon the Continent, and will undermine the stability of the parliamentary system.

Whatever his opinion of the conclusions which the author reaches, every student of government will read with respectful and absorbing interest his discussion of federalism and its application to the British Empire. His analysis of the weaknesses of federal government is profound and convincing. His contention that, "Federalism, when successful, has generally been a stage towards unitary government. In other words, federalism tends to pass into nationalism," and his citing the United States as an example of "a nation concealed under the form of a federation" may well cause the American reader to ponder. Federalism, he says, must not be confounded with nationalism in another sense. "A truly federal government is the denial of national independence to every state of the federation. No single state of the American Commonwealth is a separate nation; no state . . . has anything like as much of local independence as is possessed by New Zealand or any of the five Dominions." What Ireland has been demanding for so long is not federalism, but nationalism,

"Ireland a Nation." Professor Dicey is unalterably opposed to the federalization of the British Empire. The time is not ripe for any such hazardous experiment. It will tend to weaken rather than strengthen the Empire, and it is opposed to the entire course of development of British institutions.

The splendid tone of the entire introduction is typified by the words he uses in this connection. "I yield to no man in my passion for the greatness, the strength, the glory, and the moral unity of the British Empire. I am one of the thousands of Englishmen who approved, and still approve, of the war in South Africa, because it forbade secession. But I am a student of the British constitution; my unhesitating conviction is that the constitution of the Empire ought to develop, as it is actually developing, in the same way in which grew up the constitution of England." C. A. M.

---

HISTORY OF ROMAN PRIVATE LAW. Part II. Jurisprudence. By E. C. Clark. Cambridge: Cambridge University Press. 1914. 2 volumes. pp. xiv, 802.

One cannot read these volumes without a feeling of regret that so much learning and so much sound yet acute scholarship should have been expended upon the carrying out of so unfortunate a plan. The scope and the execution of the work were obviously determined by the exigencies of English university teaching upon the basis of Austin and the Roman institutional books in preparation for an examination in those subjects along settled lines. As Professor Clark tells us in his preface, candidates for examination may also be students; but the limitations imposed upon study and teaching by candidacy for examination before examiners who follow conventional lines are strikingly apparent even in a book prepared primarily for those studying a subject for its own sake. The two volumes are a critique of Austin with reference to the history of Roman law and an examination of the ideas of Roman jurists and institutional writers from the standpoint of English analytical jurisprudence. Hence we get neither a treatise upon jurisprudence nor a history of Roman law, though the work bears both titles. Moreover, the self-imposed limitations of English analytical jurisprudence exclude many things which would be valuable and significant in either type of book taken by itself.

In many particulars, however, Professor Clark has gone beyond the English analytical and historical jurists. Thus he rejects the once orthodox English view of the total irrelevancy of philosophy in jurisprudence (I, 24). In contrast with Austin's vigorous exclusion of every ethical element in duty and in political obligation he is willing to consider "popular morality," since it is a prime factor not only in the remote origin of law but in its "daily growth and improvement at the present time" (I, 86–87). The nineteenth century by way of reaction from the infusion of morals into law and identification of law and morals in the seventeenth and eighteenth centuries sought to separate them. It sought certainty rather than ethical results. It is very significant that the ethical side is again making itself felt in juristic writing, and in this respect Professor Clark's book is quite abreast of the current. This tendency appears also in connection with the appeal to popular morality in judicial consideration of what is reasonable (I, 106). He shows that this is what the Roman *æquitas* was, and of course it is what is demanded by those who insist upon equitable application of law in Continental Europe and those who insist upon a more liberal judicial application of law in this country. Again, he not only rejects the metaphysical method of the nineteenth-century philosophy of law for which the English have never had any taste, but he appears to throw over Sir Henry Maine's historical-metaphysical method and the resulting exclusively political interpretation of jurisprudence to which Maine's Ancient Law gave